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No. 02-1711

In The Supreme Court Of The United States

CINCINNATI SMSA LIMITED PARTNERSHIP,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In its petition, Cincinnati SMSA ("SMSA") asks this Court to review a purely historical question—namely, whether Ohio ever had the authority to enforce certain now-defunct Ohio regulations directed toward commercial mobile radio service ("CMRS") providers. In doing so, however, SMSA mentions only in passing the two key reasons why such review is unwarranted. First, the case is moot. While the Public Utilities Commission of Ohio ("PUCO") order that SMSA seeks to challenge here did originally expose it to potential liability, SMSA admits it has voluntarily settled the only damages action that could be brought based on that order. *See* Pet. at 15, 28. And because, as SMSA further admits, the PUCO expressly declined to impose either a fine or any injunctive relief, *see* Pet. at 14, the PUCO order places SMSA under no ongoing disability. Accordingly, a decision from this Court would have no impact on SMSA in this case, and the case is thus moot.

Second, even were that not so, in December 1999 the PUCO issued an order *specifically exempting CMRS providers (such as SMSA) from either of the regulatory requirements that SMSA seeks to challenge as preempted here*. In short, there is no live controversy between these parties. Rather, Petitioner seeks an advisory opinion from this Court regarding the scope of preemption under the Communications Act of 1934. While this may present an interesting hypothetical question, this Court has long recognized that "[u]nder Article III of the Constitution this Court may only adjudicate actual, ongoing controversies ..." *Honig v. Doe*, 484 U.S. 305, 317 (1988) (citation omitted); *Preiser v. Newkirk*, 422 U.S. 395, 401-03 (1975). This case simply does not qualify.

Review is unwarranted for another reason as well. The Federal Communications Commission ("FCC")—the federal agency charged with administering the regulatory

regime for CMRS providers—has yet to address whether 47 U.S.C. § 332(c)(3)(A) preempts regulations like the now-defunct Ohio regulations challenged here. That is, § 332(c)(3)(A) preempts only state law "rate regulation" and "market entry regulation." But the FCC has yet to consider whether these ambiguous terms encompass either discriminatory-rate claims (*i.e.*, rules requiring CMRS providers to charge the same rate to both affiliated and unaffiliated resellers) or structural-separation requirements (*i.e.*, regulations requiring a CMRS provider to separate its retail and wholesale businesses) like those the now-defunct Ohio regulations at one time imposed below. In SMSA's own words, the FCC "has not finished drawing the line between preempted rate regulation and 'other terms and conditions' of CMRS." *See* Pet. at 24. Accordingly, as a jurisprudential matter, this Court should defer consideration of the questions presented here until the FCC—the agency to whom Congress has entrusted implementation of the statutory scheme at issue here—has acted. This approach is particularly appropriate where, as here, no party will be harmed by delay. As noted above, SMSA has settled the only claim against it that could result from the PUCO order below, and the PUCO ended enforcement of the regulatory requirements on a going-forward basis.

Finally, even if the Court were not inclined to provide the FCC the first opportunity to interpret this statutory language, two additional reasons also support denial of certiorari here. First, this is a case of first impression. The alleged split in authority on which SMSA relies simply does not exist. The cases that SMSA cites considered state regulations far different from those presented here. Accordingly, the Court should await further development in the lower courts before accepting review. Second, review is unnecessary here because the court below got it right. The FCC has indicated that it is unwilling to read "rate regulation" as broadly as SMSA urges here for preemption

purposes under § 332, and the Ohio regulations at issue here fall comfortably outside the preemptive scope of § 332 thus understood. Thus, whether viewed from the standpoint of jurisdiction, jurisprudence, or the merits, this case provides a particularly poor vehicle for addressing the questions Petitioner presents.

STATEMENT OF THE CASE

I. Ohio Was On The Vanguard Of CMRS Deregulation.

In 1985, the Public Utilities Commission of Ohio ("PUCO") was among the first of the state regulatory agencies to begin deregulating cellular telephone service providers—part of the broader category now known under federal law as commercial mobile radio service or "CMRS." *See In the Matter of the PUCO Investigation Into the Regulatory Framework for Telecommunications Services in Ohio*, No. 84-944-TP-COI, 66 P.U.R. 4th 572, 1985 Ohio P.U.C. Lexis 44 (Apr. 9, 1985), at *28-*30. In 1993, Congress also got into the act, amending 47 U.S.C. § 332(c) to preempt States' authority "to regulate the entry of or the rates charged by CMRS providers." In doing so, however, it expressly preserved the States' ability to regulate "other terms and conditions" of CMRS. 47 U.S.C. § 332(c)(3)(A) ("§ 332").

In October 1993, the PUCO de-tariffed CMRS provider rates, thereby allowing the market to set those rates in Ohio. *In the Matter of the Commission Investigation Into the Implementation of Sections 4927.01 to 4927.05, Revised Code as They Relate to Competitive Telecommunications Services*, No. 89-563-TP-COI, 1993 Ohio PUC Lexis 1161 (October 22, 1993), at *48-*51. The PUCO, however, retained its authority to hear complaints under R.C. § 4905.26 regarding unreasonable or unlawful activity. *Id.*

The following year, in 1994, the FCC implemented § 332 and de-tariffed most CMRS services (including cellular). *In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, Second Report and Order (March 7, 1994) at ¶¶ 175, 179. Much like the PUCO had, the FCC expressly retained its jurisdiction over complaints alleging anti-competitive activity. *Id.* at ¶ 176.

In 1999, the PUCO further deregulated the CMRS industry in Ohio. In particular, the PUCO stated that it would no longer enforce either the prohibition on unreasonably discriminatory rates or the separation requirement in the CMRS industry, the very requirements about which SMSA complains here.[1] *See In the Matter of the Commission Investigation Into the Alternative Regulatory Treatment of Commercial Mobile Radio Service Providers*, No. 97-1700-TP-COI, 1999 Ohio PUC Lexis 745 (December 16, 1999) ("*December 1999 Order*") at *39-*45.

II. The PUCO Adjudication Of Westside Cellular's Complaint.

In 1993, Westside Cellular, Inc. d/b/a Cellnet ("Cellnet") filed a complaint before the PUCO against numerous wholesale cellular providers in Ohio (including SMSA). *See In the Matter of the Complaint of Westside Cellular, Inc. d//b/a Cellnet*, No. 93-1758-RC-CSS, 2001 Ohio PUC Lexis 18 (Jan. 18, 2001), Pet. App. at 4a-176a. Cellnet alleged several violations of Ohio's regulatory scheme, which purportedly resulted in monetary damage to Cellnet. It is that complaint that began the action in which SMSA is seeking review here.

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[1] The order is further detailed in Section III below.

Under Ohio law, the PUCO had exclusive jurisdiction over Cellnet's complaint, and a finding of a violation by the PUCO was a necessary predicate to a potential later court action by Cellnet seeking treble damages. *See* Ohio Revised Code ("Ohio R.C.") § 4905.61; *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 152, 573 N.E.2d 655 (1991) (affirming PUCO's exclusive jurisdiction over matters related to utility rates or service, and allowing a treble damages action under Ohio R.C. 4905.61 to proceed only upon the PUCO's finding of a violation).

Cellnet's complaint before the PUCO alleged, among other claims, that SMSA (and the other CMRS providers) violated Ohio law by (1) discriminating against Cellnet with regard to the wholesale terms and conditions of service when compared to the terms and conditions offered to SMSA's own retail affiliates, and (2) refusing Cellnet's request to "make capacity available on a wholesale basis" at the same rates SMSA charged to SMSA's own affiliated retail business (together, the "discriminatory rate claim"). *See* Pet. App. at 11a. Cellnet further alleged that SMSA (and the other providers) failed to maintain separate operations and records for its wholesale and retail business as required by Ohio law (the "separation requirement"). Pet. App. at 10a.

Recognizing the possibility that the case raised preemption concerns, in 1994 the PUCO sought a ruling on the scope of its authority pursuant to § 332(c) from the agency best suited to resolve the issue: the FCC. In requesting FCC guidance, the PUCO expressly disclosed the nature of the allegations that Cellnet was advancing before it. *See, e.g., In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service, Order on Reconsideration* (*"FCC Ohio Order on Reconsideration"*), 10 F.C.C.Rcd. 12427 (August 3, 1995), at 12433-12439 (discussing matters related to Cellnet complaint). And some of the respondents to Cellnet's

complaint proceeding also filed papers with the FCC further elaborating on the nature of the case. *See FCC Ohio Order on Reconsideration*, 10 F.C.C.Rcd. 12427, 12428, n.4.

The FCC, however, declined to prevent the PUCO from moving forward. It noted as a preliminary matter in its initial Ohio order that: "Unlike some of the opponents of the [PUCO] Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and federal regulation of CMRS entirely, it could have done so easily." *In the Matter of Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Service* ("*FCC Ohio Order*"), 10 F.C.C.Rcd. 7842 (May 4, 1995), at 7844. The FCC further explained that Ohio retained regulatory authority over the "other terms and conditions" of CMRS arrangements:

> Ohio states that it presently exercises jurisdiction over cellular service providers and radio common carriers to ensure that wholesale cellular rates are not below cost through its complaint authority . . . *[A]lthough Ohio may not prescribe, set, or fix rates* in the future because it has lost authority to regulate "the rates charged" for CMRS rates, *it does not follow that its complaint authority under State law is entirely circumscribed.* Complaint proceedings may concern carrier practices, separate and apart from their rates . . . [Ohio can also continue to regulate "other terms and conditions" of CMRS, including customer billing information and practices, billing disputes, and contractual arrangements between CMRS providers] . . . to the extent that such review does not *directly affect* end-user rates.

FCC Ohio Order, 10 F.C.C.Rcd. at 7852-53, at ¶¶ 43-44 (emphasis added). The decision thus recognized: (1) that notwithstanding § 332's preemption provision, Ohio had complaint authority over cellular providers; (2) that the FCC defines "rate regulation" narrowly to include only regulation *directly* affecting *end-user* rates; and (3) that the FCC confirmed that the PUCO generally continued to retain complaint authority over CMRS providers. The FCC, in its Ohio ruling, also declined to opine definitively on the record before it on the "demarcation between preempted rate regulation and retained state authority over terms and conditions" of CMRS. *FCC Ohio Order*, 10 F.C.C.Rcd. at 7852, at ¶ 42.

In 1995, just days before the FCC issued its order, one of the respondents named in the Cellnet complaint sued the PUCO in federal district court seeking to enjoin the PUCO from adjudicating Cellnet's complaint. The plaintiff based its claim for injunctive relief on the grounds that federal law preempted the PUCO from acting on the Cellnet complaint. The district court granted a preliminary injunction, but the Sixth Circuit reversed thereby allowing the PUCO to proceed. *See GTE Mobilnet of Ohio, et al. v. Johnson, et al.*, 111 F.3d 469 (6th Cir. 1997).

After extensive discovery, the PUCO conducted hearings on Cellnet's complaint from January 1999 through March 1999. During these hearings, the PUCO expressly restricted its consideration to claims regarding conduct by SMSA and the other named providers that occurred between 1993-98. Pet. App. at 10a.

In January 2001, the PUCO ruled on the merits of Cellnet's claims. The PUCO found that between 1995 and 1998 SMSA engaged in discriminatory conduct, did not maintain separate accounting records for retail and wholesale functions as required by state law, and from 1993-95 did not

comply with prior PUCO orders regarding separation of accounting and operational functions for SMSA's affiliated retail and wholesale businesses. *In the Matter of the Complaint of Westside Cellular, Inc. d/b/a Cellnet*, No. 93-1758-RC-CSS, 2001 Ohio PUC Lexis 18 (Jan. 18, 2001), Pet. App. at 175a (paragraphs numbered (6), (7), and (8)).[2] The PUCO found that SMSA's (called "Ameritech Mobile" in the PUCO order) conduct violated its prior orders and violated Ohio R.C. § 4905.33 (discriminatory rates), Ohio R.C. § 4905.35 (undue preference), and Ohio R.C. § 4905.54 (violation of PUCO orders), and Ohio R.C. § 4905.22 insofar as SMSA failed to make its wholesale capacity available to Cellnet. Pet. App. at 175a; *see also* Pet. App. at 169a, 147a-149a, 89a-95a, and 66a-73a.

Because the PUCO had issued an order in 1999 prospectively exempting CMRS providers from the regulatory requirements that it concluded SMSA and the others had violated (see discussion in Section III below), the PUCO neither imposed a fine, nor any form of injunctive relief. Rather, the PUCO expressly stated that it was merely making a retrospective finding regarding the legality of the respondents' conduct during the 1993-98 period. In the PUCO's own words: "The Commission specifically calls attention to the fact that any determination to be issued in this case is retrospective in nature. In its Finding and Order of December 16, 1999, the Commission instituted the new regulatory scheme under which commercial mobile radio service providers are to operate." Pet. App. at 60a. *See also* Pet. App. at 171a (". . . Since this is a case of first impression

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[2] In a separate appeal, the Ohio Supreme Court reversed the PUCO's determinations that most of SMSA's violations of law were limited to 1995-98, and held that the violations of law that the PUCO had found in the *Cellnet* case encompassed the time period of 1993-98. *See Westside Cellular, Inc., v. Public Utilities Comm. of Ohio*, 98 Ohio St. 3d 165, 781 N.E.2d 199 (Dec. 26, 2002).

relative to the Commission's ability to hear complaint cases involving allegations of discrimination with respect to commercial mobile radio service providers, the Commission concludes that, in this particular case it will not assess any fines pursuant to § 4905.54, Revised Code.").[3]

The same day that the PUCO rendered its decision, Cellnet sued SMSA in an Ohio trial court (the "damages action"), based on the PUCO order. It filed its action under Ohio R.C. § 4905.61, which allows for recovery of treble damages caused by a utility company's violation of statutes or regulatory orders. Under Ohio law, for purposes of the damages action, the PUCO determination was dispositive on the question of liability. The only question to be litigated, as the trial court recognized, was the amount of damages. *Westside Cellular, Inc., d/b/a Cellnet v. New Par, et al.*, Case No. 428050 Opinion (March 21, 2003), Pet. App. at 193a-194a.

While the damages action was pending in trial court, SMSA exercised its right to challenge the PUCO liability determination through direct review of the PUCO order in the Ohio Supreme Court (the "liability appeal"). *See* Ohio R.C. §§ 4903.11, 4903.12, and 4903.13. Because the damages action was premised solely on the PUCO's liability determination, and because SMSA was challenging that finding before the Ohio Supreme Court in the liability appeal, SMSA also asked the Ohio Supreme Court to stay trial court consideration of the damages action. The Court granted the

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[3] While the PUCO also states in its order in this case that it was "not creating a defense to potential future claims under §§ 4905.33 and 4905.35, Revised Code," Pet. App. at 171a, in the context of its 1999 deregulation order eliminating the requirements as to CMRS providers that were the basis of Cellnet's complaint, the likelihood that another similar complaint might be brought against SMSA with regard to conduct occurring before the 1999 deregulation order is remote.

stay, thereby holding the damages action in abeyance pending the outcome of the liability appeal. *Cincinnati SMSA v. Pub. Util. Comm.*, (Entry) (Nov. 19, 2002), Appendix to Respondent's Brief ("PUCO App.") at A-2.

On December 30, 2002, the Ohio Supreme Court decided the liability appeal, unanimously affirming the PUCO's finding that SMSA had violated Ohio law, and rejecting SMSA's federal preemption claim. *Cincinnati SMSA v. Pub. Util. Comm. of Ohio*, 98 Ohio St.3d 282, 781 N.E.2d 1012 (2002), Pet. App. at 1a-3a; *see also New Par v. Pub. Util. Comm. of Ohio*, 98 Ohio St. 3d 277, 781 N.E.2d 1008 (2002), Pet. App. at 178a-184a. It is this Ohio Supreme Court decision that SMSA asks this Court to review.

Because the liability appeal was over, the judge in the damages action issued a pre-trial ruling on a pending motion to limit the scope of damages at trial. *Westside Cellular v. New Par,* Opinion (March 21, 2003), Pet. App. at 185a-195a. Shortly thereafter, SMSA and Cellnet settled Cellnet's damages claims in their entirety.[4] Accordingly, Cellnet dismissed its case against SMSA with prejudice. *Westside Cellular v. New Par,* Journal Entry (April 2, 2003), PUCO App. at A-1. Thereafter, SMSA filed this petition for writ of certiorari.

III. In 1999, The PUCO Exempted CMRS Providers From The Regulatory Requirements That SMSA Complains Of Here.

In 1999, while the Cellnet complaint was pending before the PUCO, the PUCO decided (in a separate and unrelated proceeding) to further deregulate the CMRS

[4] The PUCO was not a party to that settlement, and accordingly is not certain of its precise terms.

industry in Ohio. *See December 1999 Order* at *39-*45.[5] In its order, the PUCO found that because of changes in the telecommunications industry that promoted competition, the PUCO "no longer need[ed] to maintain the current level of regulatory oversight of CMRS." *Id.* at *39. Accordingly, the PUCO chose to "grant CMRS an exemption from a number of existing Commission requirements." *Id.* at *39-*40. Of particular importance to this case, the PUCO expressly stated that it was exempting the CMRS industry from both of the requirements of which SMSA complains here. First, the PUCO expressly eliminated the separation requirement (*i.e.*, the rule requiring CMRS providers to maintain separate wholesale and retail operations). In the PUCO's own words: "The Commission finds that it is no longer necessary to require that CMRS providers continue to maintain structurally separate wholesale and resale operations." *Id.* at *40-*41. Second, the PUCO determined that it would no longer entertain discriminatory wholesale rate complaints from CMRS resellers (such as the type of complaint Cellnet brought against SMSA here). *See id.* at *42 (the PUCO "no longer believes that it is necessary to apply Section[] 4905.26 [*i.e.*, PUCO's complaint authority] . . . to the CMRS wholesale market"). The PUCO's 1999 deregulation order means that CMRS providers no longer face the regulatory strictures that form the basis for the petition here.

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[5] In doing so, the PUCO acted pursuant to Ohio R.C. § 4927.03, which permits the PUCO to exempt, by order, any telephone company or companies (*i.e.*, including cellular providers) as to any public telecommunications service except basic local exchange service, from any provision of Chapter 4905 or 4909 of the Revised Code or any rule or order issued by PUCO under those chapters.

REASONS FOR DENYING THE PETITION

I. This Case Is Moot In Light Of SMSA's Decision To Settle The Damages Claim Against It, And The PUCO's Decision Not To Impose Fines Or Prospective Relief Against SMSA.

A fundamental tenet of federal jurisdiction is that an actual controversy must exist at all stages of judicial review. *Golden v. Zwickler*, 394 U.S. 103 (1969); *Preiser v. Newkirk*, 422 U.S. 395, 401-03 (1975); *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972). Federal court jurisdiction is limited to resolving "real and substantial" controversies as distinguished from issuing opinions advising parties on academic questions of law. *Preiser v. Newkirk*, 422 U.S. at 401. Here, however, SMSA has settled the only claim for money damages that could result from PUCO's liability determination, and the PUCO expressly elected not to impose either fines or injunctive relief. Accordingly, all that is left of this case are SMSA's academic questions about the extent of preemption under § 332 and its concerns about the possible precedential effect of the Ohio Supreme Court decision. Neither of these, however, provides any basis for jurisdiction here.

A. Cellnet And SMSA Settled Their Dispute.

The purpose of Cellnet's complaint before the PUCO was to establish liability in order to pursue a treble damages action under Ohio R.C. § 4905.61. Under Ohio law, any such action for damages must be preceded by, and is entirely contingent upon, a liability determination by the PUCO. *See* Ohio R.C. § 4905.61. *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 152, 573 N.E.2d 655 (1991) (treble damages action under Ohio R.C. § 4905.61 first requires PUCO liability determination); *accord, State ex rel. Dayton Power & Light Co. v. Kistler*, 57 Ohio St.2d 21, 385

N.E.2d 1076 (1979). Thus, Cellnet's damages action against SMSA in 2001 was premised entirely upon the PUCO's finding of liability. And, conversely, the purpose underlying SMSA's appeal to the Ohio Supreme Court of that PUCO liability determination was to avoid those damages.

As SMSA admits, however, *see* Pet. at 15, 28, in April 2003 the parties settled that damages case. And this Court has repeatedly recognized that settlements of an underlying action render a case moot. *See generally U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) (discussing effect of mootness by reason of settlement); *cf. Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 192 (2000) (no federal court jurisdiction over cases in which one or both parties plainly lacks a continuing interest, "as when the parties have settled..."); *Buck's Stove & Range Co. v. American Federation of Labor*, 219 U.S. 581 (1911) (dismissing appeal where oral argument revealed that settlement mooted case). Accordingly, SMSA cannot rely on its now-extinguished exposure to potential damages to establish jurisdiction here.

B. The PUCO Imposed No Fines Or Injunctive Relief Against SMSA.

Under statute, the PUCO could have imposed other sanctions—either fines (forfeitures) or injunctive relief—against SMSA for SMSA's violations of Ohio law. *See* Ohio R.C. §§ 4905.54; 4905.381. And if the PUCO had done so, this case may not be moot. But the record plainly shows that the PUCO chose *not* to impose any such sanction against SMSA. *See In the Matter of the Complaint of Westside-Cellular, Inc. d/b/a Cellnet*, (Ohio P.U.C. 2001), Pet. App. at 171a, 175a. Accordingly, nothing in this case turns on this Court's resolution of the appeal, and it is therefore moot. *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (case was

moot where plaintiff, who challenged law school's admission policy, was admitted to law school and would complete his legal studies regardless of any court decision).

Further underscoring the mootness here, the PUCO has eliminated the regulatory requirements of which SMSA complains. In December 1999, the PUCO amended its regulations to eliminate (1) its complaint authority to review discriminatory rate claims against CMRS providers such as the one at issue here, and (2) the requirement that CMRS providers maintain separate operations and accounting for their wholesale and retail business (*i.e.*, the separation requirement). *See December 1999 order* at *40-*45, ¶¶ 2, 3 and 4. Since these provisions have already been eliminated, this Court need not consider whether it should strike them down as preempted.

Moreover, because the PUCO does not intend to revive these regulations, SMSA cannot squeeze this now-moot case into the "capable of repetition, yet evading review" exception to the mootness doctrine. *Cf. DeFunis*, 416 U.S. at 319 (challenge to law school admissions policy was not "capable of repetition" as to law student who was about to graduate from the school); *see also Friends of the Earth, Inc.*, 528 U.S. at 192 (even if case has been litigated for years, mootness prevents continuation where one or both parties plainly lacks a continuing interest, "as when the parties have settled..."); *Diffenderfer v. Central Baptist Church, Inc.*, 404 U.S. 412, 414-15 (1972) (case moot where statute challenged as unconstitutional had been repealed). At bottom, whatever decision this Court may reach on the merits, SMSA faces neither fines, nor injunctions nor damages. Thus, review is not warranted here.

C. SMSA's Hypothetical Concern About Precedential Effects Is Not Enough To Overcome Mootness.

All that is really left is SMSA's concern about the possible precedential effect of the Ohio Supreme Court's decision in other cases, especially cases in other states. *See* Pet. at 29. That fear about what may happen in *other* cases, however, is insufficient to avoid mootness in *this* case. *Cf. Lane v. Williams*, 455 U.S. 624, 634 (1982) ("the possibility that other persons may litigate a similar claim does not save this case from mootness"); *American Family Life Insurance of Columbus v. Federal Communications Commission*, 129 F.3d 625, 629-30 (D.C. Cir. 1997), *citing Radiofone, Inc. v. FCC*, 759 F.2d 936, 939 (D.C. Cir. 1985) (possible precedential effect of case not enough to avoid mootness); *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 589 (1961) (agreeing that if threat of prosecution under arguably superseded state statute arose, and if a state court decided that the statute was still applicable, "that would be time enough to consider that statute's validity").

In short, SMSA cannot simultaneously settle the damages case—the only sanction it faced as a result of the PUCO order—yet continue to litigate the liability determination based on its concern about the potential future effect of the decision below. Denial of certiorari here is thus merely an application of the principle that a "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *U. S. Bancorp*, 513 U.S. at 25. SMSA chose to settle the only damages action that could be brought based on the PUCO order. *Cf. id.* ("[i]n these respects the case stands no differently than it would if jurisdiction were lacking because the losing party failed to appeal at all."); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 72 (1997) (non-class-action challenge to state constitutional amendment mandating use of English in the

workplace became moot when plaintiff, who sought to use her bilingual skills in the workplace, left state employment). Consequently, this case is moot, and there is no reason to grant certiorari here.

II. Review Is Not Warranted Here Because The PUCO Has Eliminated The CMRS Regulatory Requirements Of Which SMSA Complains.

Aside from the (now-moot) issues presented in the proceeding below, SMSA posits concerns about potential future problems in other cases if the decision below were followed. *See, e.g.*, Pet. at 2, 29 (claiming that if other states did as the Ohio court did here, "regulatory chaos" would ensue). But those concerns do not warrant review here. The PUCO's December 1999 Order eliminated the regulatory requirements SMSA dislikes, and, if another State follows the Ohio Supreme Court's preemption analysis in examining *other* laws in *other* cases, then the parties in those cases may appeal. That does not change the fact that this case, and these regulatory requirements, are history, and thus there is no reason for this Court to waste its limited resources by accepting review.

As discussed above, the PUCO's decision, although it found that SMSA's conduct violated then-existing Ohio law, imposed no prospective sanctions on SMSA. And, because PUCO's December 1999 Order eliminated any application of the challenged regulatory requirements here to future conduct by CMRS providers, SMSA (or any other CMRS provider in Ohio) will not be subject to sanctions by the PUCO for similar conduct in the future. As of 2000, the PUCO will no longer hear complaints against CMRS providers that are based on claims of alleged discrimination in wholesale rates, and it has dropped the separation requirement. *December 1999 Order* at *39-*45. And, because PUCO will not hear such complaints, private parties cannot pursue any such

claims in court. *See* Ohio R.C. § 4905.61; *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St.3d at 152. Thus, the regulatory conflict and confusion that SMSA speculates may occur in future cases is certainly not going to occur in Ohio. The party here, the PUCO, is officially out of the business of monitoring allegedly discriminatory wholesale rates.

The PUCO's December 1999 Order changing Ohio's CMRS regulatory landscape similarly undercuts SMSA's extra-territoriality argument. *See* Pet. at 16. SMSA asserts that because of the nature of cellular phone transmission (*i.e.*, by radio wave to the closest cellular tower), the imposition of regulatory authority in Ohio can have direct effects in neighboring States (since cellular phones in those States may use Ohio towers and vice-versa). But, as noted above, the PUCO has ended enforcement of these regulations against CMRS providers in Ohio, and thus SMSA's fears of extra-territorial regulatory creep beyond Ohio's borders cannot materialize.

SMSA's concerns about potential claims by other cellular resellers against SMSA (or other cellular carriers) for pre-1999 conduct, *see* Pet. at 28, are similarly misplaced. During the six years the *Cellnet* case was pending before the PUCO below, no other cellular reseller sought to join as a plaintiff. If nobody joined then, the odds are slim that a new plaintiff will show up now. The remote possibility that some as yet unidentified party might conceivably make such a claim at some unspecified future time does not make review necessary (or appropriate) here.

In short, the specter SMSA raises of a complaint being filed against it in Ohio is not only hypothetical, but also remote. This Court should not accept review merely to pre-decide the outcome of such far-fetched contingencies.

III. SMSA Has Failed To Identify A Well-Developed Split Among The Lower Courts—The Cases SMSA Cites Do Not Consider The Same Issue As That Presented In The Ohio Case Below.

SMSA premises its request for review upon a supposed conflict between the Ohio decision below and other courts regarding the scope of preemption under § 332. *See, e.g.*, Pet. at 2, 16-17, 21, 24, 28-30. Indeed, SMSA states that "the Ohio Supreme Court is the only court ever to have upheld state power to regulate CMRS on the matters at issue in this case." Pet. at 17, 24. What SMSA fails to acknowledge, though, is that the Ohio Supreme Court is also the only court ever to have *considered* these matters. While state and federal courts have considered preemption claims under § 332 with regard to *other* state law claims, only the decision below addresses whether a state law claim *for discriminatory conduct* by a CMRS provider is preempted by § 332. Consequently, as to that issue, the Ohio decision is one of first impression, and this Court should thus await further development in the lower courts before accepting review.

SMSA's petition asks whether the now-inapplicable provisions of Ohio law that SMSA was found to have violated are preempted under 47 U.S.C. § 332(c)(3)(A) as regulation of rates or market entry of CMRS providers. That statute provides in relevant part: "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating other terms and conditions of commercial mobile service . . . ."

In deciding whether a federal law preempts a state statute, the Court looks to the text and structure of the federal statute in question. If the statute contains an express

preemption clause, and the one here does, statutory construction focuses first on the plain wording of the clause, which contains the best evidence of Congress's preemptive intent. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), *citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). In its petition, SMSA cites a number of cases that have considered the text in § 332, as well as cases determining preemption under different statutory language. Those cases, however, are inapposite in the face of the state-law rate-discrimination claim presented here, and thus they do not provide the conflict that SMSA seeks to establish here.

SMSA relies heavily upon *Texas & Pac. Ry. Co. v. Abilene Cotton Oil*, 204 U.S. 426 (1907), and its progeny, *see* Pet. at 19-21, in claiming a conflict regarding the scope of preemption under § 332, but that reliance is misplaced. SMSA uses these cases to argue that other courts have held that state-law rate-discrimination claims constitute rate regulation for federal preemption purposes. To be sure, in *Abilene Cotton*, the Court held a state law unreasonable rate discrimination claim to be preempted by federal law—there a law that required carriers to file their rates in tariff form with the Interstate Commerce Commission and, once the ICC approved those rates, to uniformly charge them to all customers. *Abilene Cotton*, 204 U.S. at 439.

But the principle originating in the *Abilene Cotton* case is explicitly based on the existence of filed tariffs "as an effective means for redressing the wrongs resulting from unjust discrimination." *Id.; see also AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) (applying filed rate doctrine); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 301-02 (1988) (Michigan law impacting natural gas rates preempted by FERC requirement for filed tariffs); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (filed rate doctrine prohibited award of damages for breach of contract during

time when utility was subject to FERC's jurisdiction). Where (as here) no tariff requirement applies and the federal agency does not prescribe the rates to be charged, the *Abilene Cotton* principle does not apply. Indeed, the FCC itself has recognized that the "filed rate doctrine" that emerged from these cases provides no guidance in assessing whether a given state law providing for monetary damages is preempted as "rate regulation" under § 332, or is instead an "other term or condition" of CMRS as to which states retain authority under that section. *See In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C.Rcd. 17021 (2000), at ¶¶ 19, 21. *See also* Section IV, below.

The federal appellate court cases SMSA cites, *see* Pet. at 24-25, also fail to support its claim that a "conflict" with the decision below exists. Both *G&T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3rd Cir. 1987), and *Alliance Shippers, Inc. v. Southern Pacific Transportation Co.*, 858 F.2d 567 (9th Cir. 1987), involve preemption of discriminatory rate claims under federal statutes deregulating railroads. There, though, the legislative history of the federal statute, upon which the courts expressly relied, stated that "[n]o state law or federal or state common law remedies are available." *See G&T Terminal*, 830 F.2d at 1234 (citation omitted). Neither § 332(c)(3)(A), nor, for that matter, its legislative history, *cf. H.R. Report No. 103-111* (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588, however, contains such a broad, all-encompassing statement of preemption of state law. Accordingly, these cases do not conflict with the case below, which considered preemption under a different, and narrower, provision.

The other federal and state cases cited by SMSA to support its claim of a "conflict" with the decision below do not even address the issue of whether discriminatory conduct claims are preempted by § 332. *See* Pet. at 21-24. For example, in *Tenore v. AT&T Wireless Servs.*, 962 P.2d 104

(Wash. 1998), the court determined that plaintiffs' state law *false advertising* claims concerning carrier rates were *not* preempted by § 332.[6] False advertising claims are, of course, far different from the discriminatory conduct claim presented below, so whatever the merits of the Washington court decision, it does not create a conflict with the Ohio decision below.

Another case on which SMSA relies, *Digital Communications Network, Inc. v. AT&T Wireless Serv.*, 63 F.Supp.2d 1194 (C.D. Cal. 1999), *see* Pet. at 22, similarly fails to create any meaningful conflict. There, the plaintiff made an "unreasonable rate" claim predicated on 47 U.S.C. §§ 201 and 202, *i.e.*, on *federal* law. The principal question facing the court was whether the court should resolve this federal law claim itself, or instead refer it to the FCC under the doctrine of "primary jurisdiction." 63 F. Supp.2d at 1196-97. While the court did, in passing, consider the preemptive scope of § 332 with regard to certain California regulations, *id.* at 1198-99, the question before the court was whether the federal court, or the FCC, should resolve the federal law claims. *Id.* at 1199. Moreover, to the extent the court even discussed the issue, the court relied almost entirely on the California PUC's own understanding of the reach of its regulatory authority. *Id.* at 1198-99. The California PUC's position, however, is not necessarily inconsistent with the Ohio Supreme Court ruling here. The California PUC merely concluded in its 1996 order that § 332 "prohibits this Commission from setting a particular numerical margin that must be provided to cellular resellers." *Id.* at 1198. Of

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[6] The FCC's determination that § 332 preempts State authority to prohibit CMRS providers from charging for incoming calls or charging in whole-minute increments, *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.Rcd. 19898 (1999), at ¶ 23, *see* Pet. at 24, also did not address the issue of discriminatory conduct claims such as the one under the former Ohio law at issue here.

course, Ohio's former requirement, that wholesale rates not be unreasonably discriminatory, is a far cry from a regulation that directly establishes a "particular numerical margin."

SMSA additionally argues, *see* Pet. at 26-28, that the PUCO's former rule requiring CMRS providers to separate their wholesale and retail operations constitutes preempted "market entry" regulation under § 332. Ironically, the PUCO imposed its separate wholesale/retail accounting requirements for the express purpose of facilitating non-discriminatory competition and promoting ease of market entry.[7] *See* App. at 67a (PUCO's separate accounting requirement was "intended to permit a subsequent review of transactions between the underlying wholesale carrier and its affiliated reseller for the purpose of ascertaining whether 'the affiliated reseller received access to any cellular services, or any component bundled therewith, at prices and/or terms and conditions different from those available to nonaffiliated resellers'"). But, in any event, the regulation itself, which merely imposed a formal structural separation requirement, is far different from the state law claim at issue in *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983 (7th Cir. 2000), the case on which SMSA principally relies to create a "conflict." *See* Pet. at 27. There, the plaintiff's state law claim contended that the CMRS provider should have built more cellular

[7] The PUCO's passing comment in its December 1999 order to the effect that PUCO was eliminating the requirement that CMRS providers maintain separate wholesale and retail operations "in order to ensure that no company will be restricted from entering the Ohio market as a result of a mandated structural organization," *December 1999 order* at *41, does not serve to transform that now-eliminated requirement into a market entry regulation.

towers, a far more intrusive, and expensive, regulation than that at issue here. Accordingly, *Bastien* does not create any conflict justifying a grant of certiorari here.[8]

IV. Review Is Unwarranted For The Additional Reason That Judicial Review Of The Scope Of Preemption Under § 332 Is Premature.

Not only has the specific preemption issue presented in this case not been addressed by other federal courts of appeal or state courts of last resort, but the FCC, the agency charged with administering the regulatory regime for CMRS providers, has yet to offer its opinion on the scope of "rate" or "market entry" regulation under § 332. Furthermore, SMSA has an avenue available to it if it desires guidance from the FCC on this issue. The FCC is authorized to issue a declaratory ruling "terminating a controversy or removing uncertainty." 47 CFR § 1.2. An FCC interpretation of the meaning of "regulate the entry of or the rates charged" in 47 U.S.C. § 332(c)(3)(A) would allow the FCC to bring its considerable expertise on CMRS matters to bear on the important question of the appropriate scope of preemption. Especially in light of the fact that nothing would turn on the

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[8] Further, any suggestion by SMSA, *see* Pet. at 27-28, that the FCC's failure to impose a similar separation requirement impliedly preempted the former Ohio requirement misses the mark. One of the FCC orders on which SMSA relies for its implied preemption argument itself refers to a then-existing California PUC separation requirement. *See* FCC *Resale NPRM*, 6 F.C.C.Rcd. 1719 (1991), at ¶ 28, n.35. In light of the FCC's reference to an apparently similar wholesale/retail separation requirement, there is no reason to suppose that the FCC "impliedly preempted" such regulation. In any event, the PUCO's elimination of its separation requirement, *December 1999 Order* at *40-*42, ¶¶ 2 and 3, makes review of this issue unnecessary in this case.

Court's decision here, as a jurisprudential matter the Court should decline review, thereby giving the FCC the first shot at interpretation.

This Court has long recognized the usefulness of a federal administrative agency's interpretation of a statutory or regulatory provision that the agency is charged with administering. To that end, the courts may invoke the "primary jurisdiction" doctrine to permit the parties to seek an administrative ruling on a matter within the agency's area of expertise that may affect the determination of the legal issue pending in court. *See generally United States v. Western Pacific Ry. Co.*, 352 U.S. 59 (1956). Additionally, when Congress has not expressed its intention with regard to a question (that is, when a statute administered by an administrative agency is ambiguous), the court generally will defer to the agency's interpretation of the provision if that interpretation is reasonable. *See generally Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The issue of preemption here turns on whether the discriminatory conduct claims litigated in the case below under former Ohio law were preempted by 47 U.S.C. § 332 as "rate regulation" (or "market entry" regulation), and the FCC has not addressed the meaning or scope of either of these terms in this context. Thus, the Court should decline to review these issues until the FCC weighs in. This approach makes sense as a jurisprudential matter, and is consistent with principles of primary jurisdiction and deference to agency determinations recognized in this Court's cases.

Declining review of this case is particularly appropriate where, as here, an FCC decision regarding the scope of preemption under § 332 in another factual context indicates that the agency is reluctant to read "rate regulation" in § 332(c)(3)(A) as broadly as SMSA urges here. Contrary to SMSA's implication in its petition (at 18-21), the "filed rate" doctrine, *see, e.g., Arkansas Louisiana Gas Co. v. Hall*,

453 U.S. 571 (1981), cited at Petition at 20, does not apply to preemption analysis in the now-deregulated CMRS industry. The FCC recognized as much in 2000. It rejected the argument that the analysis under the "filed rate" cases—in which courts have found that calculating and awarding damages is tantamount to rate regulation—should apply in cases addressing whether state law claims are preempted under § 332. *See In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C. Rcd. 17021 (2000), at ¶¶ 19 and 21 (noting that the distinction between "rate regulation" on the one hand, and "other terms and conditions" of CMRS subject to state jurisdiction, on the other hand, is not part of the logic or analysis of the filed rate doctrine).[9]

Moreover, the FCC's analysis in *Wireless Consumers Alliance* of the more limited scope of "rate regulation" preemption under § 332 is consistent with this Court's recognition that a statute limiting a state's authority to "regulate rates" is narrower in its preemptive effect than a statute that preempts state laws that "relate to" rates. *See Morales v. Trans World Airlines*, 504 U.S. 374, 385 (1992). In *Morales*, the Court considered a federal preemption challenge to a Texas air travel industry guideline that purported to require certain disclosures as to fare terms, restrictions and availability by air carriers. The federal statute at issue, the Airline Deregulation Act, prohibited States from enforcing any law "relating to" rates, routes, or services of any air carrier. Texas contended that the federal

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[9] Although FCC opined that the term "rates charged" in § 332(c)(3)(A) may include both rate levels and rate structures for CMRS, and that states are preempted from regulating either of these, *Southwestern Bell*, 14 F.C.C.Rcd. 19898 at ¶ 20, it did not discuss discriminatory conduct claims such as those at issue here under former Ohio law. *Cf. FCC Ohio Order*, 10 F.C.C.Rcd. 7842 (1995), at ¶ 43 (declining to rule that PUCO's then-existing complaint authority under Ohio R.C. § 4905.26 was preempted).

statute only preempted the States from actually prescribing rates, routes or services. This Court, however, concluded that such a construction "simply reads the words 'relating to' out of the statute." *Id.* at 385. According to the Court, "[h]ad the statute been designed to preempt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services.'" *Id.*, *citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987) ("A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate [a matter], a law . . . must be specifically then directed toward [it]."). Under *Morales*, then, the FCC reasonably could decide that state law discriminatory conduct claims such as those at issue here were not preempted by § 332 as "rate regulation" or "market entry" regulation.

Here, the PUCO's order was not specifically directed toward setting rates to be charged by CMRS providers, *cf. Morales*, 504 U.S. at 385, but simply at preventing discrimination between unaffiliated and affiliated cellular resellers. In other words, the PUCO did not even attempt to determine the "appropriate" rate to be charged by SMSA, but merely sought to ensure that SMSA offered the same rate, however set by SMSA, to unaffiliated resellers as it did to its own affiliated retail operation. Contrary to SMSA's assertion, *see* Pet. at 18, a discrimination claim such as the one at issue here does not involve determining "reasonableness," but rather only "sameness." As the Sixth Circuit stated when reversing a district court's injunction against the PUCO's consideration of the case below, "[u]nder Ohio law, it makes no difference if the rate charged is two cents a minute or twenty dollars a minute, as long as

affiliated resellers are charged the same rates as unaffiliated resellers." *GTE Mobilnet of Ohio v. Johnson*, 111 F.3d 469, 477 (6th Cir. 1997).[10]

Had SMSA maintained some sort of accounting records that showed the rates it charged its affiliated retail arm, the proof in this case would have been a simple matter of comparison of the rates offered to SMSA's retail affiliates with those offered to Cellnet. But because SMSA had failed to implement the then-existing "separation requirement," it lacked such information. Accordingly, the PUCO applied an evidentiary presumption that, for purposes of comparing rates, SMSA's internal wholesale rate (*i.e.*, the rate it charged its affiliated retailers) was zero. *See, e.g.*, Pet. App. at 2a-3a (Ohio Supreme Court ruling); Pet. App. at 90a-91a (PUCO order, concluding that SMSA (called "Ameritech Mobile" in the order) failed to appropriately maintain records that would assist the PUCO in potentially ruling in its favor, and noting specifically that there was no evidence that Ameritech Mobile's retail affiliate purchased service at rates under the same terms and conditions as nonaffiliated resellers); Pet. App. at 92a (noting testimony of a Mr. Ferber, then regional general manager for SMSA, admitting that there was no rate between Ameritech Mobile's wholesale and retail affiliates, but if there were, it would be lower than that allowed under the pricing matrices presented at the hearing [*i.e.*, prices offered to unaffiliated resellers]); Pet. App. at 93a-95a. Application of this evidentiary presumption, however, is far

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[10] In concluding that the Ohio law at issue in the case below was not facially preempted by 47 U.S.C. § 332(c)(3)(A), the Sixth Circuit relied on *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298 (9th Cir. 1995) (holding that a federal statute expressly preempting state regulation of cable television rates did not prevent a cable television operator from bringing an action in state court alleging that a competitor was engaging in below-cost predatory pricing, reasoning that the California statute at issue did not regulate rates), *cert. dismissed*, 517 U.S. 1152 (1996).

different than "prescribing rates" for a CMRS provider. Consequently, the FCC, or this Court, could reasonably conclude that the PUCO's order in this case did not have the effect of "regulating" rates of a commercial mobile service provider contrary to 47 U.S.C. § 332(c)(3)(A).[11]

As the FCC recognized in *Wireless Consumers Alliance*, the "other terms and conditions" exception to preemption would be completely eliminated if one equates state action that may increase the cost of doing business with rate regulation. *See* 15 F.C.C.Rcd. 17021 at ¶ 34, *citing CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999); *cf.* 15 F.C.C.Rcd. 17021 at ¶ 36 (holding that the award of money damages in state contract or tort causes of action would generally fall under the "terms and conditions" exception to preemption in § 332). *Cf. In the Matter of Petition of Pittencrief Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 F.C.C. Rcd. 1735 (Sept. 25, 1997) at ¶ 18 (rejecting argument that the "other terms and conditions" exception to preemption in § 332 is limited to matters concerning consumer protection and the promotion of competition). If a state does not purport to determine the reasonableness of a prior rate or set a prospective charge for services, *cf.* 15 F.C.C.Rcd. 17021 at ¶ 39, § 332 does not necessarily preempt a damage award under state law.

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[11] Because SMSA settled the treble damages claim that Cellnet brought against it in the related court action, no calculation of damages ever took place. Not only would calculating a "reasonable rate" for SMSA have been unnecessary in the damages action, *cf. GTE Mobilnet*, 111 F.3d at 477-78, the settlement means that no damages of any kind were, or will be, calculated in connection with the liability determination below. SMSA's contention that "[t]he calculation of Cellnet's claim for damages was based on the PUCO's finding that SMSA's 'internal wholesale rate' was zero," Pet. at 15, accordingly is misleading.

Moreover, while SMSA correctly notes that the federal government has elected not to regulate through the use of filed tariffs, *see* Pet. at 5, that does not mean that all state law remedies that have any impact on rates charged for CMRS services are preempted. The FCC itself recognized this in rejecting a contention that all money damages awards based on state law tort and contract claims against CMRS providers were preempted by § 332 as rate regulation. 15 F.C.C. Rcd. 17021, at ¶ 36. In so ruling, the FCC agreed that enforcement of tort and contract laws through a monetary remedy is compatible with the federal statute's purpose of promoting the CMRS industry's reliance on a competitive market. *Id.* at ¶ 24.

For all of these reasons, the Court should decline to review the preemption issues in this case until the FCC has considered the scope of rate and market entry regulation under § 332 with respect to discriminatory conduct claims against CMRS providers. The PUCO certainly agrees with SMSA that "the views of the FCC should be heard" on these issues. Pet. at 30. But the PUCO respectfully suggests that this Court should await the FCC's interpretation of the statute at issue before reviewing, in another case, the legal issues presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

In the
Court of Common Pleas
Cuyahoga County, Ohio

Westside Cellular, Inc., d/ba Cellnet of Ohio Cellnet	:	Case No: CV-01-428050
Plaintiff,	:	Judge: Timothy J. McGinty
v.	:	
New Par, et al	:	JOURNAL ENTRY
Defendant.	:	

89 DIS. W/PREJ – FINAL

All claims and counterclaims settled and dismissed with prejudice. Each party to bear its own attorneys' fees and costs. Final. Court cost assessed as each their own.

/s/
Judge Signature

Date: April 2, 2003

APPENDIX B

In The
Supreme Court of Ohio

Cincinnati SMSA Limited Partnership,	:	Case No. 01-1158
Appellant	:	
v.	:	ENTRY
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

This cause is pending before the Court as an appeal from the Public Utilities Commission of Ohio. Upon consideration of appellant's motion for stay of trial pending appeal,

IT IS ORDERED by the Court that the motion for stay of trial pending appeal be, and hereby is, granted.

(P.U.C.O.; No. 931758RCCSS)

/s/
THOMAS J. MOYER
Chief Justice